MALAYAN BANKING BHD v. PUNJAB NATIONAL BANK

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[SUIT NO: 22NCC-28-01-2014]
13 NOVEMBER 2018

BANKING: *Banks and banking business – Letter of credit – Issuance of letter of credit ('LC') by plaintiff bank in favour of beneficiary – Defendant bank irrevocably undertook to pay and reimburse on maturity date of LC – Beneficiary required to present certain documents to obtain payment under LC – Whether documents complied with terms of LC – Allegation of discrepancy in documents – Whether defendant bank absolved from reimbursing plaintiff bank on grounds of discrepancy – Whether defendant bank gave valid notice of refusal – Whether given within prescribed time – Whether defendant bank bound to honour obligation*

The plaintiff agreed to act as the advising bank in a letter of credit transaction ('LC') issued by the defendant, in favour of SIMS Copper Sdn Bhd ('beneficiary') at the request of Sara International Limited. The LC, governed by the provisions of Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No 600 ('UCP-600'), was conveyed by the defendant through a SWIFT message dated 18 November 2011 to the Royal Bank of Scotland ('RBS'), which was forwarded by RBS to the plaintiff on 22 November 2011. The defendant irrevocably undertook to pay and reimburse the negotiating bank on the maturity date of the LC, *ie*, 60 days from the date of the bill of lading ('reimbursement undertaking'). The beneficiary was required to present certain documents to obtain payment under the LC ('documents'). The terms that state the LC allowed for negotiations by any bank in Malaysia and the requirement for the beneficiary to present the documents to obtain payment under the LC came about as a result of an amendment to the LC. The amendment was conveyed by the defendant through a SWIFT message dated 21 November 2011 to RBS, which was forwarded by RBS to the plaintiff on 23 November 2011. The plaintiff, upon receiving the LC and amendment and upon being satisfied with their apparent authenticity, advised the beneficiary of the opening of the LC and the amendment. On the request of the beneficiary, the plaintiff, on 25 November 2011, negotiated the documents and paid a total sum of RM1,983,765.65 to the beneficiary under the LC. On 30 November 2011, the plaintiff received the original documents and bills of exchange from the beneficiary, which contained no difference from the faxed copies presented by the beneficiary on 24 November 2011. On 1 December 2011, the plaintiff forwarded the original documents and bills of exchange to the defendant by courier and pursuant to the reimbursement undertaking, sought reimbursement of the sum paid to the beneficiary under the LC. The plaintiff had expressly instructed the defendant to remit payment to Wells Fargo Bank, New York ('Wells Fargo')

for credit of the plaintiff and send all communication in regard to the documents to the plaintiff. By a SWIFT message dated 1 December 2011 to RBS, the defendant requested, on behalf of the applicant, for an additional document to be presented under the LC ('proposed amendment'). RBS forwarded the proposed amendment to the plaintiff on 5 December 2011, after the plaintiff had negotiated and forwarded the original documents and bills of exchange to the defendant. On 20 December 2011, the plaintiff received a notice of refusal from the defendant. The defendant acknowledged receipt of the original documents and bills of exchange but claimed that the documents contained discrepancies ('purported discrepancies'). By ten SWIFT messages, the plaintiff disputed the purported discrepancies and the validity of the notice of refusal. The plaintiff also demanded payment and reimbursement of the sum paid to the beneficiary. The defendant, subsequently, returned the documents alleging that the applicant was not ready to waive the purported discrepancies. It is a common practice for banks to seek waiver whenever there were issues raised about the documents presented in letters of credit transaction. However, when there was no payment, and reimbursement was forthcoming from the defendant, the plaintiff commenced an action to enforce the reimbursement undertaking given by the defendant. The question for the court's determination were: (i) what were the documents required to be presented and to obtain payment under the LC; (ii) whether the proposed amendment was valid and formed part of the terms of the LC; and (iii) whether the documents presented by the beneficiary to the plaintiff which were subsequently forwarded to the defendant on their face complied with the terms of the LC.

Held (allowing plaintiff's claim):

(1) The plaintiff, as the negotiating bank, was perfectly entitled to make advanced payment to the beneficiary in anticipation of submission of the original documents by the beneficiary. Nowhere in the UCP-600 was the obligation to examine the original documents imposed on the plaintiff, as the negotiating bank, before payment could be made to the beneficiary. Further, DW1, the officer of the defendant, admitted that the defendant had received the complete set of the original documents from the plaintiff on 3 December 2011. It was not necessary for the plaintiff to prove that they had examined the fax copies of the documents before making payment to the beneficiary, and as such, there was plainly no reason to invoke s. 114(g) of the Evidence Act 1950. (para 59)

(2) Upon presentation of the original documents to the defendant, the plaintiff had the right to be reimbursed. The defendant was obligated to honour the reimbursement undertaking they gave and such obligation was not absolved *ipso facto* even if the bills of lading were not compliant on the ground of discrepancy in the documents. In order to avoid their liability and obligation to pay and reimburse the plaintiff on the ground

of discrepancy, art. 16(f) of the UCP-600 obligated the defendant to give a notice of refusal to the plaintiff in accordance with art. 16(c) and (d) of the UCP-600. The defendant failed to give a valid notice of refusal to the plaintiff as the negotiating bank and presenter, and therefore, by operation of art. 16(f), they were precluded and estopped from claiming the documents were discrepant. Further, the defendant's reliance on the notice of refusal and their SWIFT message dated 8 December 2011 to Wells Fargo, to support their defence that they were not obligated to honour their reimbursement undertaking, could not be accepted as the notice was not issued within the prescribed time in accordance with art. 14(b) of the UCP-600. Hence, the defendant was liable to pay and reimburse the plaintiff. (paras 59, 60 & 65-67)

(3) The bills of lading had not been issued and signed by a freight forwarder. Notice of refusal dated 20 December 2011 purported to refuse the documents pursuant to art. 23 of the UCP-600, which dealt with requirements of 'Air Transport Document'. The documents required under the LC and presented herein had nothing to do with any air transport document. Hence, the defendant had no basis to reject the documents pursuant to art. 23. (paras 70 & 71)

(4) By virtue of art. 7(b) and (c) of the UCP-600, the defendant, as the issuing bank, was irrevocably bound to honour as at the time the LC was issued and the reimbursement undertaking was given to the plaintiff. The proposed amendment, was only forwarded by RBS to the plaintiff on 5 December 2011, after the plaintiff had negotiated and forwarded the original documents and bills of exchange to the defendant. The proposed amendment came too late and could not affect the plaintiff's right to seek payment and reimbursement from the defendant, which had already arisen at the time of negotiation of the documents and presentation of the documents to the defendant. Further, art. 10(a) and (c) provide that the terms of the LC could not be amended without the agreement of the beneficiary. The evidence confirmed that the proposed amendment was not accepted by the beneficiary. As such, the certificate did not form part of the documents required under the LC. (paras 72-74)

(5) Wells Fargo was appointed by the plaintiff for the limited purpose of tracing and receipt of funds under the LC. Therefore, the notice to Wells Fargo could not, in law, be treated as notice to the plaintiff of the purported discrepancy in the documents and Wells Fargo's knowledge of it could not properly be imputed to the plaintiff. Hence, the defendant's reliance on s. 182 of the Contracts Act 1950, to contend that the notice of refusal sent to Wells Fargo was valid, was misconceived. Further, the defendant's contention that Wells Fargo was the agent of the plaintiff for all purposes, was also misplaced (paras 75-78)

(6) Estoppel did not apply against the plaintiff as there was no representation by the plaintiff that they acknowledged the purported discrepancies and the validity of the notice of refusal. By the ten SWIFT messages, the plaintiff disputed the purported discrepancies and the validity of the notice of refusal. The plaintiff had never retracted or altered that position. In fact, the plaintiff had demanded the defendant for the payment and reimbursement of the sum paid to the beneficiary under the LC. Since the defendant had not made any payment to the plaintiff, the issue of refund did not arise. (para 83)

(7) The acceptance advices, issued by the plaintiff to the beneficiary, showing the payment made under the LC, were standard templates. The plaintiff issued the standard acceptance advices for actual Onshore Foreign Currency Loan financing or in cases where the plaintiff made payment in foreign currency pursuant to negotiation of documents in letter of credit transaction without any financing. The contemporaneous documentary evidence showed that the plaintiff had paid the sum of USD1,983,765.65 to the beneficiary pursuant to the negotiation of the documents under the LC and not pursuant to any loan or financing granted to the beneficiary. (paras 87 & 88)

(8) Further, the fact that the plaintiff had released payment to the beneficiary before the maturity date did not absolve the defendant from their obligation to honour the reimbursement undertaking they gave upon receipt of the documents presented by the plaintiff. In the circumstances, the defendant's contention of fraudulent act on the part of the plaintiff in releasing the payment to the beneficiary before the maturity date of the LC was wholly unsustainable. (para 90)

Case(s) referred to:

AMMB International (L) Ltd v. Pernas Holdings Sdn Bhd & Anor [2004] 1 LNS 525 HC ***(refd)***

Amixco Asia (Pte) Ltd v. Bank Bumiputra Malaysia Bhd [1992] SLR (R) 65 ***(refd)***

Azman Mahmood & Anor v. SJ Securities Sdn Bhd [2012] 6 CLJ 573 FC ***(refd)***

Beam Technology (Mfg) Pte Ltd v. Standard Chartered Bank [2003] 1 SLR (R) 597 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

China New Era International Ltd v. Bank of China (HK) Ltd & Ors [2010] 5 HKC 82 ***(refd)***

Chua Weng Meng v. Wong Kok Kong [1999] 6 CLJ 7 HC ***(refd)***

Fortis Bank SA/NV and another v. Indian Overseas Bank, HC (UK) [2010] 2 All ER (Comm) 28 ***(refd)***

Gian Singh & Co Ltd v. Banque de L'Indonchine [1974] SGPC1 [1974-1976] SLR (R) 83 ***(refd)***

Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***

Inter Diam Pte Ltd v. PJ Diamond Centre Sdn Bhd [2002] 4 CLJ 715 HC ***(refd)***

Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishnan Kaliannan [2013] 6 CLJ 149 FC ***(refd)***

Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran [1999] Vol 1 CA Lloyd's Law Report 36 ***(refd)***
Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] 1 CLJ 350; [1984] 1 CLJ (Rep) 326 FC ***(refd)***
Southern Ocean Shipbuilding Co Pte Ltd v. Deutsche Bank AG [1993] 3 SLR(R) 86 ***(refd)***
Toyota Tsusho Corporation v. Comerica Bank, US District Court 1996 US Dist. LEXIS 9336 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 182
Evidence Act 1950, ss. 45, 90A(1), (2), 114(g)
Subordinate Courts Rules 1980, O. 29 r. 9(4)

For the plaintiff - Mong Chung Seng & Chia Oh Sheng; M/s Lee Hishammuddin Allen & Gledhill
For the defendants - T Gunaseelan & Keshvinjeet Singh Sidhu; M/s Gunaseelan & Assocs

Reported by S Barathi

JUDGMENT

Noorin Badaruddin J:

[1] This is an action commenced by the plaintiff against the defendant for recovery of the sum of USD1,983,765.65, which the defendant undertook to pay and reimburse the plaintiff under a Letter of Credit No. 20 1529FLC-11204/11 ("LC") issued by them.

[2] After a long protracted interlocutory application disputes, the trial of this action was finally held on 21 May 2018 and 22 May 2018. The plaintiff and the defendant called one witness each, namely Nazrin bin Mohd Nazir the Assistant Vice President of the Transaction Banking Centre, Transaction Banking, Global Banking of the plaintiff ("PW1") and Sudhir Kumar Kalra an officer of the defendant ("DW1").

Background Facts

[3] At the request of the defendant, the plaintiff agreed to act in the LC transaction. The LC being a device used to finance international sale was issued by the defendant in favour of SIMS Copper Sdn Bhd ("beneficiary") at the request of Sara International Limited ("applicant").

[4] The LC was conveyed by the defendant through a SWIFT message dated 18 November 2011 to the Royal Bank of Scotland ("RBS"), which was forwarded by RBS to the plaintiff on 22 November 2011.

Terms Of The LC

[5] The salient terms of the LC *inter alia* are as follows:

(a) The LC is governed by the provisions of Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP-600");

(b) The value of the LC is USD1,962,500, with a tolerance of plus/minus 2% in value;

(c) The LC allows negotiation by any bank in Malaysia;

(d) The LC allows partial shipments of goods. The goods are described as continuous cast copper wire rod 8mm dia in coil form – HS code 7408.11 quantity 250 mt (plus minus 2 percent) at unit price of USD7,850 per metre;

(e) The plaintiff is to act as the advising bank under the LC.

(f) The defendant irrevocably undertakes to pay and reimburse the negotiating bank on the maturity date of the LC, that is, 60 days from the date of the bill of lading ("reimbursement undertaking");

(g) The beneficiary is required to present the following documents to obtain payment under the LC:

(i) Commercial invoice in triplicate signed by the beneficiary;

(ii) Packing list in triplicate issued by the beneficiary;

(iii) Full set signed clean on board ocean bills of lading;

(iv) Certificate of origin in triplicate issued by the beneficiary or the manufacturer in the country of origin;

(v) Marine insurance policies or certificates in full set in duplicate;

(vi) A certificate issued by a shipping company or agent stating the vessel is registered with an approved classification society and is seaworthy.

(vii) A certificate from a shipping company or agent stating the carrying vessel is ISM certified and not more than 20 years of age. ("documents")

[6] The terms that state the LC allows for negotiations by any bank in Malaysia (item 5(c)) and the requirement for the beneficiary to present the documents to obtain payment under the LC (item (g)(iv)) came about as a result of an amendment to the LC ("amendment"). The amendment was conveyed by the defendant through a SWIFT message dated 21 November 2011 to RBS, which was forwarded by RBS to the plaintiff on 23 November 2011.

[7] After receiving the LC and amendment, the plaintiff checked them for their apparent authenticity. Upon being satisfied with their apparent authenticity, the plaintiff on 24 November 2011 advised/informed the beneficiary of the opening of the LC and the amendment.

Negotiation Of Documents

[8] On 24 November 2011, the beneficiary presented faxed copies of the documents and bills of exchange to the plaintiff in separate presentations and requested the plaintiff to negotiate (ie, purchase) them.

[9] On 25 November 2011, the plaintiff negotiated the documents and paid a total sum of USD1,983,765.65 to the beneficiary under the LC.

[10] On 30 November 2011, the plaintiff received the original documents and bills of exchange from the beneficiary. The plaintiff through PW1 confirmed that the original documents and bills of exchange contained no difference from the faxed copies presented by the beneficiary on 24 November 2011.

[11] On 1 December 2011, the plaintiff forwarded the original documents and bills of exchange to the defendant by courier and pursuant to the reimbursement undertaking, sought reimbursement of the sum paid to the beneficiary under the LC. In their covering schedules enclosing the original documents and bills of exchange, the plaintiff expressly instructed the defendant to remit payment to Wells Fargo Bank, New York ("Wells Fargo") for credit of the plaintiff and send all communication in regard to the documents to the plaintiff. The material parts of the covering schedules read:

> Our Reference: 99110WAM2155558
> Pudu Trade Finance Centre
> 2nd Floor, 418-424 Jalan Pudu
> 55100 Kuala Lumpur, Malaysia
>
> Swift : MBBEMYKLXXX
> Telex : Telex ANSBK:
> Cable :
> Documentary Credit Schedule
> Mail To:
> Punjab National Bank
> CC-21 Nehru Enclave
> Kalkaji New Delhi 110019-India
>
> Your reference: 1529FLC-11204/11 Dated: 18/11/11
>
> …
>
> We enclose the following documents for negotiation/payment:
>
> Mailing 1 mailing 2 document name
>
> Kindly effect your payment in accordance with the instructions given below:
>
> We certify endorsement of drawing amount is on the reverse of the credit
>
> We certify documents received within presentation period and validity of credit

A We certify all terms and conditions of letter of credit are complied with

Advise acceptance and maturity date by swift/telex.

Upon payment, kindly remit proceeds by <airmail/swift/telex> to Wells Fargo Bank, New York Penn Plaza 4th Floor New York, NY 10001 USA for credit of Maybank, Kuala Lumpur quoting above reference number
B and advise us by authenticated swift/telex of the amount remitted.

Please also instruct Wells Fargo Bank, New York 11 penn plaza 4th floor New York, NY 10001 USA to advise us by authenticated telex/swift MT202/MT400 of the amount credited quoting our reference number accordingly. our telex number is/swift code is MBBEMYKLAXXX.

C Please acknowledge receipt of this documentary credit schedule by airmail.

This drawing is subject to uniform customs and practice for documentary credits (2007 revision), ICC Publication No 600.

All communications regarding this documentary credit schedule should be
D sent to our above address quoting our reference number.

[12] The original documents and bills of exchange were sent to the defendant on 1 December 2011 and delivered to them on 3 December 2011.

[13] Pursuant to and in compliant with UCP-600, if the defendant wishes to reject the documents on the ground of discrepancy, they had until
E 10 December 2011 to do so by sending a notice of refusal.

Proposed Amendment

[14] By a SWIFT message dated 1 December 2011 to RBS, the defendant requested on behalf of the applicant for an additional document to be
F presented under the LC, namely Certificate of Analysis, Weight and Quality in triplicate issued by SGS at loading port ("proposed amendment"). The proposed amendment was only forwarded by RBS to the plaintiff on 5 December 2011, after the plaintiff has negotiated and forwarded the original documents and bills of exchange to the defendant.

G **[15]** The plaintiff notified the beneficiary of the proposed amendment on 6 December 2011 but did not receive any response from them. The proposed amendment was in the event not accepted by the beneficiary.

Rejection Of Documents By Defendant

H **[16]** On 20 December 2011, the plaintiff received a SWIFT message dated the same ("notice of refusal") from the defendant. The defendant acknowledged receipt of the original documents and bills of exchange but claimed that the documents contained the following two discrepancies:

I (a) Freight forwarder bills of lading presented contrary to the terms of the LC;

(b) Certificate of Analysis, Weight and Quality in triplicate issued by SGS not presented.

("purported discrepancies")

[17] It is pertinent to note that prior to 20 December 2011, the defendant had never sent any notice to the plaintiff to raise the purported discrepancies. The notice of refusal was the first notification from the defendant to the plaintiff of the purported discrepancies.

[18] By ten SWIFT messages dated 27 December 2011 and 28 December 2011 to the defendant, the plaintiff disputed the purported discrepancies and the validity of the notice of refusal. In addition thereto the plaintiff also demanded payment and reimbursement of the sum paid to the beneficiary on 21 January 2012 which is the maturity date of the LC.

[19] By a SWIFT message dated 30 December 2011 to the plaintiff, the defendant claimed they have notified Wells Fargo of the purported discrepancies *via* a SWIFT message dated 8 December 2011. The defendant also said they will return the documents to the plaintiff if they do not receive any reply by 4 January 2012.

[20] The plaintiff replied the defendant by a SWIFT message dated 3 January 2012. The plaintiff requested the defendant to seek waiver of the purported discrepancies from the applicant and thereafter, effect payment to the plaintiff. Apparently, that is the plaintiff's usual approach when dealing with a correspondent bank like the defendant. It is also a common practice for banks to seek waiver whenever there are issues raised about the documents presented in letters of credit transaction.

[21] On 4 January 2012, the defendant replied to say that the applicant is not ready to waive the purported discrepancies. The defendant also said they will return the documents to the plaintiff and requested the plaintiff to pay USD500 for their handling, postage and SWIFT charges.

[22] On 6 January 2012, the plaintiff received the original documents and bills of exchange returned by the defendant and paid the charges requested by them.

[23] Thereafter, the plaintiff continued to follow up on the status of payment and reimbursement under the LC. As payment and reimbursement was not forthcoming from the defendant, the plaintiff commenced this action to enforce the reimbursement undertaking given by the defendant under the LC.

Summary Of The Plaintiff's Contentions

[24] It is the plaintiff's contention that based on the undisputed facts and pursuant to art. 7(b) and (c) UCP-600, they have proved their claim and thus entitled to be reimbursed by the defendant as they have negotiated the documents required under the LC and made payment of USD1,983,765.65 to the beneficiary. The plaintiff submits that the documents required to be presented to obtain the payment under the LC have been delivered to the defendant.

[25] The plaintiff contends that the defendant can only avoid liability to reimburse the plaintiff if they (the defendant) can prove that the documents did not constitute a complying presentations and that a valid notice of refusal to the plaintiff pursuant to UCP-600 to reject the documents were given to the plaintiff.

[26] The plaintiff submits that apart from failing to prove the purported discrepancies, the defendant also has failed to prove that they have issued a valid notice of refusal to avoid liability to reimburse the plaintiff.

[27] In regards to the notice to Wells Fargo, the plaintiff argued that it is equally invalid as it was not sent to them as the presenter and the notice did not state that the defendant is refusing to honour or negotiate as required under art. 16(c) UCP-600.

[28] The plaintiff highlighted that the sole reason relied on by the defendant to refuse reimbursement at the material time was due to the purported discrepancies and as such the defendant is not entitled to raise other issues herein to avoid their liability.

Summary Of The Defendant's Contentions

[29] The crux of the defendant's contentions are as follows:

(i) That they are not obliged to reimburse the plaintiff as the bills of lading presented by the beneficiary ("bills of lading") was non-compliant;

(ii) The plaintiff acted on their own risk by accepting faxed copies of the documents and making payment to the beneficiary on 25 November 2011 without examining the original documents;

(iii) The sum of USD1,983,765.65 paid by the plaintiff to the beneficiary was pursuant to a loan granted by the plaintiff;

(iv) The notice to Wells Fargo is a valid notice of refusal;

(v) Adverse inference should be drawn against the plaintiff that Wells Fargo had the authority to accept a notice of refusal on their behalf and the notice to Wells Fargo was received by the plaintiff timeously;

(vi) The plaintiff is estopped from challenging the validity of the notice to Wells Fargo;

(vii) The plaintiff fails to prove that they have received the faxed copy of all the documents before making payment to the beneficiary on 25 November 2011;

(viii) That the print-out of Official R643/TA669 rev-2005-2008 published by International Chamber of Commerce ("ICC") ("ICC Opinion R643") is inadmissible.

Evaluation And Findings

[30] In the forefront, it is undisputed that pursuant to the reimbursement undertaking the defendant undertook to pay and reimburse the plaintiff for the sum paid to the beneficiary under the LC. That has been admitted by DW1, the sole witness of the defendant. By virtue of the reimbursement undertaking, the plaintiff as the negotiating bank has their own rights to purchase the documents from the beneficiary and presenting them to the defendant. In *Southern Ocean Shipbuilding Co Pte Ltd v. Deutsche Bank AG* [1993] 3 SLR(R) 86, P Coomaraswamy J held as follows:

> (1) Where a correspondent bank was nominated in the L/C to negotiate the document, or where its instructions covered only the advice of a negotiation credit and it had agreed to do so on being approached by the beneficiary to negotiate it, the correspondent bank would negotiate documents as principal, purchasing the documents from the beneficiary and presenting them to the issuing bank in its own right.

[31] The reimbursement undertaking given by the defendant is expressly provided for in Field 78 of the LC which states:

> 78: Instr to Payg/Accptg/Negotg Bank
>
> We hereby engage with the drawers and or *bona fide* holders that the draft drawn under and negotiated in conformity *(sic)* with the terms of this credit will be duly honoured on maturity and payment shall be made on due date as per your instructions or the draft amount. each draft shall be duly endorsed on the reverse of the credit by the negotiating bank.

[32] On common ground between the parties, the LC is governed by UCP-600, which is a set of rules published by the ICC to promote uniformity in letters of credit practices. The UCP-600 being the latest revision of the Uniform Customs and Practice that govern the operation of letters of credit came into effect on 1 July 2007. The application of UCP-600 can be seen from the Uniform Customs & Practice for Documentary Credits, 2007 Revision, ICC Publication No.600 (UCP 600) which states:

> Application of UCP
>
> The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which may by applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. **They are binding on all parties thereto unless expressly modified or excluded by the credit.** (emphasis added)

[33] It is pertinent to set out the relevant provisions of UCP-600. Article 7 sets out the obligation of the issuing bank ie, the defendant herein. Article 7(b) and (c) specifically state as follows:

A Issuing Bank Undertaking

b. An issuing bank is irrevocably bound to honour as of the time it issues the credit

c. An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the
B documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

C

[34] "Complying presentation" is defined by UCP-600 to mean "a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice".

D **[35]** "Presentation" is defined by UCP-600 to mean "either the delivery documents under a credit to the issuing bank or nominated bank or the documents so delivered."

[36] "Credit" is defined by UCP-600 to mean "any arrangement, however named or described, that is irrevocable and thereby constitutes a definite
E undertaking of the issuing bank to honour a complying presentation".

[37] "Negotiation" is defined as "the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds
F to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank".

[38] In the present circumstances, the rights and obligations of the parties herein are governed by both the terms of the LC and UCP-600.

[39] Upon the facts set out in the above and the evidence adduced, this
G court is satisfied that pursuant to art. 7(b) and (c) UCP-600, the plaintiff had negotiated the documents required under the LC and had made payment of USD1,983,765.65 to the beneficiary. The plaintiff has further forwarded the documents to the defendant. In the case of *China New Era International Ltd v. Bank of China (HK) Ltd & Ors* [2010] 5 HKC 82, the Hong Kong Court of
H Appeal stated:

(2) A party who successfully negotiated a documentary credit became the contracting party to the letter of credit. The purchaser does so by acquiring documents or a sufficient interest in them that would enable the purchaser to present them, in its own right, to the issuing bank for
I payment as principal and to sue if the undertaking to pay contained in the credit was not honoured. The essence of negotiation was 'the purchase of documents and their presentation under the credit in the purchaser's own right' *Cooperative Centrale Raiffeisen-Boerenleenbank BA v. Bank of China* [2004] 3 HKC 119, [2004] 3 HKLRD 477 applied (para 200).

[40] The questions to be determined are as follows:

(i) What are the documents required to be presented and to obtain payment under the LC?

(ii) Whether the proposed amendment was valid and formed part of the terms of the LC?

(iii) Whether the documents presented by the beneficiary to the plaintiff which were subsequently forwarded to the defendant on their face complied with the terms of the LC?

[41] The terms of the LC and UCP-600 are the basis to determine the issues. Pursuant to art. 14 (a) UCP-600 both the plaintiff and defendant are only required to determine whether the documents appear on their face to constitute a complying presentation. Article 14(a) UCP-600 reads:

> Standard for Examination of Documents
>
> a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents **appear on their face** to constitute a complying presentation. (emphasis added)

[42] In *Gian Singh & Co Ltd v. Banque de L'Indonchine* [1974] SGPC1 [1974-1976] SLR (R) 83, the Privy Council held as follows:

> (2) In business transaction financed by documentary credits, bank must be able to act promptly on presentation of the documents. **In the ordinary case visual inspection of the actual documents presented is all that is called for.** There is no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purports to be signature of the person named or described in the letter of credit: at [11]. (emphasis added)

[43] In the same case and on the issue of conformity, the Privy Council opined as follows:

> (1) The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirement of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering from its customer moneys paid under the credit. The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. The express provision to this effect in art 7 of the Uniform Customs and Practice for Documentary Credits does no more than re-state the duty of the bank at common law. In business transactions financed by documentary credits banks must be able to act promptly on presentation of the documents. In the ordinary case visual

A inspection of the actual documents presented is all that is called for. The bank is under no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purports to be the signature of the person named or described in the letter of credit.

[44] The *dicta* by Lord Diplock in *Gian Singh (supra)* was quoted and B followed by the Singapore Court of Appeal in *Beam Technology (Mfg) Pte Ltd v. Standard Chartered Bank* [2003] 1 SLR (R) 597. Delivering the judgment of the court, Chao Hick Tin JA stated as follows:

13. The banker is only concerned with documents and what the credit requires them to be, not with goods or the contract which requires them C to be paid for. If he does what he is told, he is safe; if he departs from the terms and conditions of the credit, he acts at his own risk. He is not obligated to go behind the documents and to consider whether the terms of the underlying contract conforms to the terms of the LC or whether they have been or will be performed: see art 3(a) of UCP 500 and *Equitable Trust Company of New York v. Dawson Partners Ltd* (1927) LI L 25 Rep 49.

D

14. Therefore, visual inspection of the actual documents presented is all that is called for. Of course, the bank must examine them with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of credit. A bank is under no duty to take further steps to investigate the genuineness of a signature which, on the face of E it, purports to be the signature of the person named or described in the letter of credit: see *Gian Singh & Co Ltd v. Banque de L'Indonchine* [1974-1976] SLR (R) 83.

15. It is also settled law that where a confirming bank has paid on a credit in the face of *prima facie* compliant documents, the confirming bank, and in turn the issuing bank, are entitled to claim reimbursement from the F applicant. This was unequivocally stated by Lord Diplock, delivering the opinion of the Privy Council in *Gian Singh* (*supra* at [11]) in these terms:

> The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirement of the credit, is in fact a forgery does not, of itself, prevent the G issuing bank from recovering from its customer moneys paid under the credit. The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. The express provision to this effect in art 7 of the Uniform H Customs and Practice for Documentary Credits does no more than re-state the duty of the bank at common law …

[45] Before this court, PW1 gave evidence that the documents on their face constituted a complying presentation and thus the plaintiff negotiated the documents. In his witness statement, PW1 states:

I

18. Q. What happened after the Bank received the Beneficiary's request to negotiate the documents?

A: I examined the documents and was satisfied that the documents on their face complied with the terms of the Letter of Credit …

[46] It is the defendant's contention that the documents contained two purported discrepancies ie, the freight forwarder bills of lading presented was contrary to the terms of the LC and that the Certificate of Analysis, Weight and Quality in triplicate issued by SGS ("certificate") was not presented.

[47] Article 14(1) *inter alia* states as follows:

UCP 600 Article 14

Standard for Examination of Documents

a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of 5 presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

[48] Apparently there are six requirements of a bill of lading under art. 20 UCP-600 and they are as follows:

(a) First, it must indicate the name of the carriers and be signed by the carrier or a named agent for or on behalf of the carrier;

(b) Second, it must indicate the goods have been shipped on board a named vessel at the port of loading stated in the LC. The indication can be made by pre-printed wording or an on board notation indicating the date on which the goods have been shipped on board;

(c) Third, it must indicate shipment from the port of loading to the port of discharge stated in the LC;

(d) Fourth, it must be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading;

(e) Fifth, it must contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage;

(f) Sixth, it must contain no indication that it is subject to a charter party.

[49] According to the defendant, under art. 7 UCP 600, the defendant is only obliged to reimburse the plaintiff if the plaintiff has negotiated a complying presentation. The defendant argued that their obligation does not arise as the beneficiary has presented freight forwarder bills of lading which is not compliant as it is unacceptable pursuant to Field 47B para. G of the LC which states as follows:

> G. Short form, blank back, stale, freight forwarder, house of bill of lading is not acceptable, charter party bill of lading is acceptable.

[50] The defendant contends that as the LC expressly modified or excludes the freight forwarder bills of lading, the plaintiff is not entitled to rely on art. 20 UCP 600 to assert that the bills of lading is compliant. The defendant argues that the documents presented by the beneficiary must be those called for by the LC and not documents which are almost the same.

[51] It is of the considered view that the bills of lading are in fact compliant. Apart from confirming that he has examined the bills of lading presented by the beneficiary and was satisfied that the bills of lading on its face complied with the requirements of arts. 14(1) and 20 UCP-600, PW1 states that in examining the bills of lading he relied on the ICC Opinion R734 which provides that the term "freight forwarder bill of lading is not acceptable" in Field 47B para. G of the LC has no meaning in the context of UCP-600 and the LC. PW1 in his evidence states the followings:

> 32. Q: Why did you say that the bills of lading presented by the Beneficiary on their face complied with the terms of the Letter of Credit?
>
> A: In carrying out my task, I do refer to the opinions issued by ICC in relating to letter of credit transactions. In this regard, pursuant to the Official Opinion R734/TA 727 15 rev-2009-2011 published by ICC ("ICC Opinion R734"), the term "freight forwarder bill of lading is not acceptable" in the Letter of Credit has no meaning because it does not specifically state what form the bill of lading should take or its signing requirements. Based on this opinion, the Bank was entitled to accept any bill of lading which complies with Article 20, UCP-600. The bills of lading presented by the Beneficiary on their face complied with the requirements of Articles 14(1) and 20, UCP-600.

[52] The relevant passage in ICC Opinion R734 (marked as P11) reads as follows:

> QUERY
>
> We have been seeing credits calling for bills of lading or multimodal transport documents and stating in the additional conditions field:
>
> 1) "*Forwarders bill of lading is not acceptable*", or
>
> 2) "Transport documents issued by freight forwarders not acceptable", or
>
> 3) "Transport documents issued or signed by freight forwarders not acceptable".

Under the foregoing conditions which of the following transport documents are acceptable? A

…

ANALYSIS/CONCLUSION

In the context of UCP 600 and letters of credit, the term "freight forwarder bills of lading" has no meaning – whether in respect of them being allowed or not allowed. B

Where freight forwarder transport documents are stated to be not acceptable, the term is ambiguous and does not clearly define the type of document that would be acceptable. For example, it is not clear whether such a credit is seeking to exclude the content of sub-article 14(l) or whether it extends to the manner in which the bill of lading is to be signed. *A document examiner will not be in a position to determine the status of the party signing when it signs as carrier.* C

None of the UCP 600 transport articles refer to the party that is to "issue" the respective transport document. The requirement is that the document must comply with the content of the applicable article and that the document may be "however named". In addition, sub-article 14(l) states "[A] transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules." It therefore follows that issuance of a transport document by a freight forwarder is an established and acceptable practice under the UCP. It should not be forgotten that irrespective of the issuer, one of the stated requirements in the referenced articles, with the exception of article 22, is that the document indicate the name of the carrier and be signed by the carrier, the master (in respect of articles 19, 20 and 21) or a named agent for or on behalf of the carrier of the master. D E F

…

Conclusion

Unless the text of a credit, incorporating one of the stated clauses, specifically states what form the transport document is expected to take or its signing requirements, each of the clauses referred to in the query has no meaning, and transport documents may be accepted on the basis that they comply with the requirements of articles 19 or 20. The same position would apply in respect of articles 21 and 23. If a company signs "as carrier", a document examiner is not required to determine the status of the signing company. (emphasis added) G

[53] The defendant objected to the admissibility of P11 on the basis that the document containing the ICC Opinion R734 does not satisfy the requirements of s. 45 of the Evidence Act 1950 ("EA"). The defendant argued that they are also deprived of the opportunity to cross-examine the person who provided the opinion. The defendant further argued that the P11 is inadmissible under s. 90A of the EA as it is a computer print-out pursuant to a search of a digital library, not a print-out of information stored in the computer in the ordinary course of business. H I

[54] The objection is overruled. PW1 gave evidence that he printed P11 from the digital library of ICC which was subscribed by the plaintiff. Pursuant to s. 90A(1) of the EA, a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement. In this regard, PW1 has tendered a certificate in compliance of s. 90A(2) of the EA. In the circumstances, the P11 is plainly admissible as it has fulfilled the requirements of s. 90A of the EA. In *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6; [1997] 3 MLJ 1 the Court of Appeal held:

> (1) (Per Shaik Daud JCA) Section 90A of the Evidence Act 1950 makes computerised records made in the course of its ordinary use admissible if the following is proven, ie that: (i) the documents were produced by a computer; and (ii) the computer records are produced in the course of its ordinary use. Proof can either be by a certificate signed by someone solely in charge of the computer which produced the printout as required by s. 90A(2), or by an officer of the bank. In this case, Zainal was able to testify with regard to the documents because he was in charge of the operations of current accounts.
>
> …
>
> (3) (Per Mahadev Shankar JCA) Zainal was not challenged by the appellant on the accuracy of the entries of the documents produced. Rather, the appeal was based on the fact that no certificate was produced under s. 90A(2) which, the appellant argued, meant that the prosecution failed to prove its case. This argument was fallacious, as Zainal was in charge of all the operations at the bank and was therefore responsible for the conduct of the activities of the bank for which that computer was used. If he chose to provide a certificate, he could have, and under s. 90A(2), the documents would have been admitted into evidence as provided by s. 90A(1). The *viva voce* evidence of the man in the witness box counts for more than a certificate issued by him (see p 13G-I).
>
> (4) (Per Mahadev Shankar JCA) Section 90A(1) is an updating of the 'best evidence rule' with the realities of the electronic age, and now it is no longer necessary to call the actual teller or bank clerk who keyed in the data provided he did so in the course of ordinary use of the computer (see p 14A-15D).

[55] There is nothing erroneous on the part of PW1 to treat the bills of lading as compliant based on the ICC Opinion R734 and this court finds no reasons not to accept the ICC Opinions R734 as they represent the views of considerable experts on the subject matter. Substantial weight is to be given to the opinion. An excerpt from the literature *Jack: Documentary Credits; The law and practice of documentary credits including standby credits and demand guarantees* 4th edn by Abdul Malek QC and David Quest is forwarded to this court and at para 1.29 in relation to the ICC Banking Commission and ICC Publication, the author states:

> 1.29 … From time to time the Commission publishes their decisions or opinions on questions concerning UCP, most recently Collected Opinions 1995-2001. These represent the views of considerable experts, and it is suggested that they should be given substantial weight by a court in accordance with the merits of the particular decision.

[56] Based on the above, it is of the considered view that the bills of lading on its face have complied with the requirements of arts. 14(1) and 20 UCP-600. The LC is governed by UCP-600 and as such art. 20 of the same is applicable. Furthermore, there is no express provision in the LC excluding the operation of art. 20. In fact, the LC did not specifically state what form the bills of lading should take or its signing requirements.

[57] In *China New Era International Ltd v. Bank of China (HK) Ltd & Ors* [2010] 5 HKC 82, by a written notice dated 26 June 2008, but sent on 2 July 2008, the appellant requested reimbursement and instructed the respondent to remit the proceeds to the appellant's head office account with Wachovia Bank, NA. It is also certified that the terms and conditions of the credit had been complied with. Documents presented to the respondent on 3 July 2008 were compliant and within the period of validity of the letter of credit. The respondent did not serve any notice under art 16 of the UCP 600. When the respondent notified New Era on 9 July 2008 of its intention to effect payment on 10 July 2008, New Era obtained *ex parte* injunction restraining the respondent from releasing the proceeds under the letter of credit to the appellant. In the court of first instance, it was held that the respondent had no obligation under art. 7c of UCP-600 to reimburse the appellant. The Court of Appeal allowed the appeal and held as follows:

> (7) *As a matter of interpretation, art. 7c did not stipulate that payment could not be made to the beneficiary by the negotiating bank until there was a fully compliant presentation, and not before. The precise manner of negotiation of the documents was a matter for the negotiating bank.* If it wished to make payment under the credit in anticipation of submission of a compliant document *in lieu* of one that was not compliant (*vide* the two initially discrepant cargo receipts) it did so at its own commercial risk, which was covered by a beneficiary's indemnity that if ultimately a 'complying presentation' could not be achieved, then such payment would be returned to the paying bank. Such discrete commercial arrangement, to which the issuing bank was not privy, did not affect the cardinal principle that, under art. 7c, the issuing bank undertook to reimburse the nominated bank that had honoured or negotiated a 'complying presentation', and had forwarded the documents constituting such compliant presentation to the issuing bank. If the documents as forwarded were found not to be compliant, there would be no obligation to reimburse. If such documents were accepted as compliant, the unequivocal obligation arose upon the issuing bank to make reimbursement to the negotiating bank of the payment as earlier made to the beneficiary (or assignee thereof) by that bank. It could not be argued that *qua* issuing bank, its reimbursement obligation was effectively dependent upon two distinct factors: (i) the fact of a 'complying

> presentation', with the documents comprising such presentation being forwarded by the bank which had taken up the documents and had effected payment under the credit, and (ii) the issuing bank was entitled to decline reimbursement, notwithstanding full documentary compliance with the terms of the credit, because at the time of payment by the nominated bank, such a 'complying presentation' had not been effected. If this were correct, the surprising (and wholly unintended) result would ensure that prior to effecting reimbursement, in addition to ensuring that the documents as forwarded to it indeed constituted a 'complying presentation', the obligation the issuing bank so to reimburse would not crystallise until it also be established that such payment as was effected by the nominated bank did not antedate an ultimately compliant presentation. The argument that the issuing bank was entitled to 'vet' or oversee the manner of negotiation by the bank which had made payment under the credit, and thereafter to justify its refusal to reimburse in face of a compliant presentation, possessed neither merit nor commercial justification (paras 51-57). (emphasis added)

[58] It is pertinent to note that from the above case, the plaintiff is entitled to determine the precise manner of negotiations of the documents. The defendant contends that under UCP-600, the plaintiff has a duty to examine the original documents and not faxed documents and as such, the plaintiff chose to act on their own risk by accepting faxed copies of the documents and making payment to the beneficiary on 25 November 2011. The plaintiff is said to have failed to prove that they have received the faxed copy of all the documents before making payment to the beneficiary. It is highlighted to the court that PW1 admitted in cross-examination that he could not find the faxed copy of some of the documents and no evidence was led by the plaintiff to prove that they have received the faxed copy of the documents which went missing. Given this, the defendant argues that adverse presumption should be drawn against the plaintiff pursuant to s. 114(g) of EA.

[59] As stated by the court in *China New Era (supra)*, the plaintiff as the negotiating bank is perfectly entitled to make advanced payment to the beneficiary in anticipation of submission of the original documents by the beneficiary. The plaintiff produces some of the fax copies of the documents and as PW1 has explained, some of the fax copies cannot be produced anymore as they have been replaced by the original documents. After all, this court finds that nowhere in UCP-600 the obligation to examine the original documents is imposed on the plaintiff as the negotiating bank before payment can be made to the beneficiary. Further, DW1 has admitted that the defendant has received the complete set of the original documents from the plaintiff on 3 December 2011. It is not necessary for the plaintiff to prove they have examined the fax copies of the documents before making payment to the beneficiary and as such, there is plainly no reason to invoke s. 114(g) of the EA. Upon presentation of the original documents to the defendant, the plaintiff has the right to be reimbursed.

[60] It is of the further considered view that the defendant is obligated to honour the reimbursement undertaking they gave and such obligation is not absolved *ipso facto* even if the bills of lading are not compliant on the ground of discrepancy in the documents (which this court finds otherwise). To avoid their liability and obligation to pay and reimburse the plaintiff on the ground of discrepancy, art. 16(f) UCP-600 obliges the defendant to give a notice of refusal to the plaintiff in accordance with art. 16(c) and (d) of UCP-600. It cannot be disputed that the defendant failed to give a valid notice of refusal to the plaintiff as the negotiating bank and presenter and by operation of art. 16(f), they are precluded and estopped from claiming the documents were discrepant.

[61] Article 16(c) states:

> c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.
>
> The notice must state:
>
> i. that the bank is refusing to honour or negotiate; and
>
> ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and
>
> iii.
>
> a) that the bank is holding the documents pending further instructions from the presenter; or
>
> b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or
>
> c) that the bank is returning the documents; or
>
> d) that the bank is acting in accordance with instructions previously received from the presenter.
>
> d. The notice required in sub-article 16(c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.

[62] Article 16(f) UCP-600 states:

> f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

[63] In *Amixco Asia (Pte) Ltd v. Bank Bumiputra Malaysia Bhd* [1992] SLR (R) 65 in rejecting the contention that a bank which gives notice of rejection is not required to state all discrepancies which may exist and is entitled to rely on other grounds at a later date the High Court of Singapore stated as follows:

A second bite of the cherry (common law)

17 It is the contention of the defendants that a bank which gives notice of rejection is not required to state all discrepancies which may exist and its entitled to rely on other grounds at a later date …

…

19 Having reviewed the law, I find myself unable to accept the contention made by the defendants. In my judgment, under the UCP 1983 the issuing bank must state all the discrepancies it seeks to rely on in the notice of rejection without delay. This means within reasonable time. No new discrepancies may be raised after the lapse of reasonable time.

…

One bite only under the UCP

31 To the exceptions mentioned above, I would add this: when a statute or contract imposes a time limit to give reasons for doing or refusing to do an act, all grounds to be relied upon must be given within the time allowed. The party must stand or fall on the grounds given within the time. It would be illogical if some grounds may be given at a later time as it would negate the statute or contract. I would, accordingly, hold that in credits subject to the UCP, new grounds for rejecting documents may not be given after reasonable time. Articles 16(e) bar a second bite at the cherry. By these articles the parties have clearly contracted out of the liberty of adducing additional discrepancies after the lapse of reasonable time.

[64] In *Fortis Bank SA/NV and another v. Indian Overseas Bank, HC (UK)* [2010] 2 All ER (Comm) 28, the Queen's Bench Division (Commercial Court) was tasked to give the proper construction of art. 16 of UCP 600 which dealt with 'Discrepant Documents, Waiver and Notice' and with situation where a bank refused to honour or comply with a presentation. The court held:

Article 16 of UCP 600 obliged the issuing bank to state what it was, and was going to be, doing with the documents. It did not speak only to time of the notice itself. It was saying that the issuing bank was going to be holding the documents pending further instructions, or returning the documents, or holding them in accordance with instructions previously received. It required the issuing bank to state what it would be doing with the documents. That the statement to be made spoke to the further was illustrated by the requirement to state that the documents would be held pending further instructions, or until it received a waiver or further instructions. The proper construction of art. 16 was that it did impose an obligation on the issuing bank to act in accordance with the disposal statement it had made in its art. 16(c)(iii) notice. Such a construction reflected both best practice and the reasonable expectations of experienced market practitioners. *The obligation to act in accordance with the disposal statement made involved, in relation to statement that documents were being*

returned or held pending or in accordance with instructions to return them with reasonable promptness. On the face of the case, the defendant had failed to act in accordance with the provisions of art. 16, therefore the preclusion in art. 16(f) applied. (emphasis added)

[65] This court finds that the defendant has failed to prove that they have given a valid notice of refusal to the plaintiff. The defendant sought to rely on the notice of refusal and their SWIFT message dated 8 December 2011 to Wells Fargo to support their defence that they are not obligated to honour their reimbursement undertaking. The defendant's reliance on those refusals, cannot be accepted.

[66] Firstly, apart from the non-compliance with art. 16(c) and (d) UCP-600, the defendant failed to issue such notice within the prescribed time in accordance with art. 14(b) UCP-600 which states that an issuing bank has a maximum of five banking days from the day of presentation of the documents to determine whether the presentation is complying.

[67] DW1 admitted that the documents were delivered to the defendant on 3 December 2011 and pursuant to art. 14(b) UCP-600, the defendant will have to determine the documents are compliant until 10 December 2011. As stated earlier "presentation" means "either the delivery documents under a credit to the issuing bank or nominated bank or the documents so delivered". As the notice of refusal was only sent 12 banking days after the documents were delivered to the defendant by the plaintiff ie on 20 December 2011, by virtue of art. 16(c) and (d) such notice is invalid as it is too late under the regime laid down by art. 16(c) UCP-600. Hence the defendant is liable to pay and reimburse the plaintiff.

[68] In *Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran* [1999] Vol. 1 CA Lloyd's Law Report 36, where the letter of credit therein was expressed subject to the Uniform Customs and Practice for Documentary Credits, 1983 (with similar provision of art. 16), the English Court of Appeal states:

d. If the issuing bank decides to refuse the documents, it must be given notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (remitting bank), or to the beneficiary, if it received the documents directly from him. Such notice must state the discrepancies in respect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presentor (remitting bank or the beneficiary, as the case may be). The issuing bank shall then be entitled to claim from the remitting bank refund of any reimbursement which may have been made to that bank.

e. If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.

[69] Unlike its predecessor, art. 16(d) UCP-600 expressly imposes a substantive obligation on the issuing bank to give a valid notice of refusal within banking days. In *Fortis Bank SA/NV and Another v. Indian Overseas Bank (supra)*, the English High Court in dealing with art. 16 UCP-600 held:

> … Timeous performance is clearly an important consideration both in relation to documentary credits and the UCP generally and to article 16 in particular. Thus the refusal notice under Article 16 must be given within five banking days of the presentation and by expeditious means. The need for expedition in giving a refusal notice would be seriously undermined if there was no time constraint in respect of actions which are required to be taken following the giving of such a notice.

[70] In addition, it is also highlighted by the plaintiff that on a cursory look at the bills of lading, they do not show that they have been issued and signed by a freight forwarder. On its face, the bills of lading appear to have been signed by Diffreight Agencies (M) Sdn Bhd on behalf of the carrier. The bills of lading do not state that Diffreight Agencies (M) Sdn Bhd is a freight forwarder. On that note, it must not be forgotten that the defendant's notice of refusal dated 20 December 2011 purports to refuse the documents pursuant to art. 23 UCP-600. The material part of the notice of refusal is reproduced:

> As per article 23 of UCP 600, documents are being refused by us and held at your disposal. We are contacting L/C applicant to accept A/M discrepancies. we may select to release documents to them against their approval without obtaining your consent, unless we receive your prior instruction to the contrary.

[71] Article 23 UCP-600 deals with requirements of "Air Transport Document." The documents required under the LC and presented herein have nothing to do with any air transport document. As such, DW1 in his evidence conceded that the defendant has no basis to reject the documents pursuant to art. 23. DW1 answered:

> MCS: So basically, ok so basically would you agree that the Defendant has no basis to refuse the documents pursuant to Article 23 of the UCP, do you agree?
>
> Sudhir: (DW1) Yes.

[72] In regards to the defendant's contention that the certificate formed part of the document under the LC by virtue of the proposed amendment which the plaintiff is said to have failed to forward to them, this court finds that the certificate is not a document required under the LC. As stated in the earlier paragraphs, by virtue of art. 7(b) and (c) UCP-600, the defendant as the issuing bank is irrevocably bound to honour as at the time the LC was issued and the reimbursement undertaking was given to the plaintiff that honoured or negotiated a complying presentation and forwarded the documents to the defendant. From the facts alluded to earlier, the proposed amendment was

only forwarded by RBS to the plaintiff on 5 December 2011, after the plaintiff has negotiated and forwarded the original documents and bills of exchange to the defendant. The proposed amendment therefore came too late and cannot affect the plaintiff's right to seek payment and reimbursement from the defendant, which has already arisen at the time of negotiation of the documents and presentation of the documents to the defendant.

[73] Further, art. 10(a) and (c) UCP-600 provide that the terms of the LC cannot be amended without the agreement of the beneficiary. Article 10(a) and (c) provide:

> Amendments
>
> a. Except as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any and the beneficiary.
>
> …
>
> b. The terms and conditions of the original credit (or a credit incorporating previously accepted amendments) will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment. The beneficiary should give notification of acceptance or rejection of an amendment. If the beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance by the beneficiary of such amendment. As of that moment the credit will be amended.

[74] Both PW1 and DW1 in their evidence confirmed that the proposed amendment was not accepted by the beneficiary. As such, it is obvious that the certificate does not form part of the documents required under the LC and the defendant's contention is rejected.

[75] The next issue raised by the defendant concerns the notice to Wells Fargo issued by the defendant on 8 December 2011. Wells Fargo was the plaintiff's agent to collect the sum payable under and to follow up the status on the LC. It is undisputed that the defendant received the documents from the plaintiff on 5 December 2011. According to the defendant, the five banking days for them to determine whether the documents were complying or otherwise would expire on 13 December 2011 and not 10 December 2011 as contended by the plaintiff. Wells Fargo sent a SWIFT message to the defendant on 6 December 2011 stating that they have been appointed by the plaintiff as agent for the purpose of tracing and receive funds under the LC. By the SWIFT message, Wells Fargo intimated that they were authorised to receive all correspondence on behalf of the plaintiff. Therefore, the defendant argued that pursuant to s. 182 of the Contracts Act 1950 ("CA") the notice of refusal sent to Wells Fargo on 8 December 2011 is valid as it has the same legal effect as if it had been given to the plaintiff.

[76] Section 182 of the CA states:

> Consequences of notice given to agent
>
> 182. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

[77] On the other hand, the plaintiff's learned counsel argued that on settled principles, s. 182 of the CA only applies to impute knowledge acquired by an agent to his principal if the knowledge is obtained by the agent while acting within the scope of his agency. This court agrees with the submission. Since Wells Fargo was appointed by the plaintiff for the limited purpose of tracing and receipt of funds under the LC, the notice to Wells Fargo cannot in law be treated as notice to the plaintiff of the purported discrepancy in the documents and Wells Fargo's knowledge of it cannot properly be imputed to the plaintiff. The defendant's reliance on s. 182 of the CA is therefore misconceived.

[78] As stated earlier, art. 16(c) UCP-600 requires the defendant to give a notice of refusal to the presenter if they refuse to honour on the ground of discrepancy in the documents. 'Presenter' is defined in art. 2 UCP-600 as a beneficiary, bank or other party that makes a presentation. In the present case, the presenter is the plaintiff as they were the party who presented the documents to the defendant. DW1 although evasive, admitted in his evidence that the presenter is the plaintiff. Further, from the contemporaneous documents, the defendant cannot be gainsaid to be unaware that any notice of refusal must be given to the plaintiff instead of Wells Fargo. As stated earlier on 1 December 2011, the plaintiff forwarded the original documents and bills of exchange to the defendant by courier and pursuant to the reimbursement undertaking, sought reimbursement of the sum paid to the beneficiary under the LC. In their covering schedules enclosing the original documents and bills of exchange, the plaintiff expressly instructed the defendant to remit payment to Wells Fargo Bank, New York for credit of the plaintiff and send all communication in regard to the documents to the plaintiff. Under those circumstances, the defendant was then fully aware as early as 3 December 2011 that any notice of refusal must be given to the plaintiff and not Wells Fargo. The defendant's contention that Wells Fargo is the agent of the plaintiff for all purposes is misplaced as in the SWIFT message dated 6 December 2011 to the defendant, Wells Fargo informed the defendant that they had been authorised by the plaintiff as agent to trace and receive payment under the LC. There is nothing more stated than that in the SWIFT message.

[79] PW1 confirmed in his evidence-in-chief that Wells Fargo was appointed by the plaintiff solely for the purposes of tracing and receiving payment under the LC. DW1, initially admitted under cross-examination that Wells Fargo's role in the LC transaction is only limited to tracing and

receiving funds for the plaintiff and any notice of refusal must be given to the plaintiff. However, DW1 changed his answer in the later part of the cross-examination (perhaps after having advantage of listening to the cross-examination of PW1 and the answers given by him) and claims that Wells Fargo was appointed by the plaintiff as agent for all purposes, notwithstanding that his contention is clearly unsustainable on a plain reading of Wells Fargo's SWIFT message dated 6 December 2011 to the defendant. Nonetheless this court is of the considered view that just like the notice of refusal, the notice to Wells Fargo is also invalid as it is not sent to the plaintiff as the presenter and it fails to comply with art. 16 UCP-600. The notice to Wells Fargo does not state that the defendant is refusing to honour or negotiate as required under art. 16(c) UCP-600. Further, the ground for rejecting the notice was also made pursuant to art. 23 UCP-600 which is baseless (since it is a provision dealing with air transport document which is not relevant to the subject matter herein) and the fact that the notice only reached the plaintiff on 27 September 2013 is clearly outside the five banking day period stipulated in art. 16(d) UCP-600.

[80] The case of *Toyota Tsusho Corporation v. Comerica Bank*, US District Court 1996 U.S. Dist. LEXIS 9336 is highlighted to this court where the strict requirement of art. 16 was adopted. The court stated:

> After reviewing the relevant case law, the court concludes that stronger authority and superior logic supports adoption of a "strict preclusion" notice standard under UCP Article 16(e), which provides that an issuing bank waives its right to offer valid grounds for rejecting LOC documents if it fails to fulfill the notice requirement in Article 16(d), and that an LOC beneficiary is not obligated to show detrimental reliance or ability to cure before this strict notice standard will apply.
>
> In support of this holding, the court notes that a "strict notice" requirement is consistent with Michigan's adoption of the majority "strict compliance" rule for presentment of LOC documents. Holding both parties to strict compliance standards will add certainty and efficiency to LOC law. In a case like this, opening up the question of plaintiff's ability to cure would raise numerous factual issues and require much speculation, thereby complicating the case tremendously. Moreover, these are sophisticated parties who are well aware of the strict compliance rules governing LOCs, and should have been aware of the numerous court decisions requiring LOC issuers to adhere to strict notice standards. Hence, the application of a strict notice rule in this case comports with fundamental principles of fairness.
>
> For these reasons, this court adopts a strict notice rule, holding that under Article 16(e) of the UCP, Comerica is estopped from relying on any valid reasons for dishonoring Toyotsu's draws of which Toyotsu was not properly notified pursuant to UCP Article 16(d).

[81] It is further argued by the defendant that the plaintiff is estopped from challenging the validity of the notice to Wells Fargo. The defendant contends that by seeking a waiver of the purported discrepancies and paying the charges for the return of the original documents (the return of the original documents and payment of the handling charges was pursuant to art. 16(g) UCP-600), the plaintiff had accepted the existence of discrepancy in the documents and the defendant has given a valid notice of refusal to reject the documents.

[82] The plaintiff *via* a SWIFT message dated 4 January 2012 sent to the defendant had requested for a waiver from the applicant (ie, Sara International) and at the same time requested the defendant to effect payment on the due date. DW1 in cross-examination admitted that it is a common practice in LC transaction that whenever there is any issue raised about the documents, the banks would ask for a waiver from the applicant. PW1 earlier testified that the request to seek a waiver of the purported discrepancies from the applicant was made in the hope that the plaintiff can obtain payment from the defendant immediately. PW1 in his witness statement states the followings:

> 46. Q: Why did the Bank request the Defendant to seek a waiver of the purported discrepancies from the Applicant?
>
> A: The Bank requested the Defendant to seek a waiver of the purported discrepancies from the Applicant in the hope that they can resolve the matter with the Defendant and obtain payment immediately. This is the Bank's usual approach when dealing with a correspondent bank like the Defendant.
>
> 47. Q: What happened thereafter
>
> A: On 4.1.2012, the Defendant replied to the Bank saying that the Applicant is not ready to waive the purported discrepancies and therefore, they are returning the documents to the Bank. The Defendant also requested the Bank to pay USD500 for their handling, postage and SWIFT charges. Please see the SWIFT message dated 4.1.2012 from the Defendant to the Bank at page 161 of CBD (Part B).
>
> 48. Q: Did the Bank receive the documents and pay the charges requested by the Defendant?
>
> A: Yes. The Bank received the documents from the Defendant on 6.1.2012 and thereafter paid the charges requested by the Defendant.
>
> 49. Q: Why did the Bank pay the handling, postage and SWIFT charges requested by the Defendant?
>
> A: As mentioned earlier, the Bank was trying to resolve the matter with the Defendant and obtain payment immediately. Due to this, the Bank did not raise any issue when the Defendant requested for payment of the handling, postage and SWIFT message charges of USD500.

50. Q: Please refer to paragraph 26 of the Defence dated 3.4.2015 at page 61 of the Bundle of Pleadings. The Defendant alleged that the Bank has acknowledged the purported discrepancies in the documents. What do you have to say about this?

A: I deny the Defendant's allegation. I refer to the evidence given by me earlier. The Bank's position on the purported discrepancies and the validity of the Notice of Refusal was clearly stated in their SWIFT messages dated 27.12.2011 and 28.12.2011 to the Defendant.

51. Q: What happened after the documents were returned to the Bank?

A: The Bank continued trying to resolve the matter with the Defendant and followed up on the status of payment under the Letter of Credit. Please see the Bank's SWIFT message dated 30.1.2012 to the Defendant at page 166 of CBD (Part B).

[83] It is of the considered view that estoppel does not apply against the plaintiff as there is no representation made by the plaintiff in the first place that they acknowledged the purported discrepancies and the validity of the notice of refusal. In support of that holding, the contemporaneous documents clearly show that such acknowledgement did not occur. By ten SWIFT messages dated 27 December 2011 and 28 December 2011, the plaintiff disputed the purported discrepancies and the validity of the notice of refusal. The plaintiff had never retracted or altered that position. The plaintiff had in fact demanded the defendant for the payment and reimbursement of the sum paid to the beneficiary under the LC. Article 16(g) relied upon by the defendant does not assist the defendant. Article 16(g) states that when an issuing bank such as the defendant refuses to honour or negotiate and has given notice to that effect, it shall be entitled to claim a refund with interest of any reimbursement made. Since the defendant had not made any payment to the plaintiff, the issue of refund does not arise at all. Further, there is no evidence before this court to show that the defendant relied upon the plaintiff's conduct in seeking the waiver and payment of the charges for the return of the original documents as acceptance to the validity of the notice of refusal.

[84] In *Azman Mahmood & Anor v. SJ Securities Sdn Bhd* [2012] 6 CLJ 573; [2012] 6 MLJ 1, in determining whether estoppel can properly be applied to create liability on the ground it was not immediately notified for a transaction that is admittedly unauthorised although no inducement, reliance or alteration of position by the delay is shown, the Federal Court answered in the following fashion:

[29] As for the issue of estoppel, we are of the view that the plaintiff has failed to demonstrate to this court on how the delay in replying to their contra statements as early as year 1996 had encouraged a belief on their part and having relied on that belief the plaintiff had altered their position. To us it is clear that the very essence of an estoppel as envisaged in the case of *Attorney General of Hong Kong And Anor v. Humphrey Estate (Queen*

Gardens) Ltd [1987] 1 AC 114 (PC) has not been satisfied. Moreover it is pertinent to note that the important provision in the plaintiff's contract note stipulate that:

> Any error must be notified to us by registered letter immediately.

[85] In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331, the Federal Court held as follows:

> (2) The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.
>
> (3) There was no evidence to suggest that the respondent had knowledge of the statement and therefore, it was entitled to assume that the invoices were good for payment because the appellant had not informed it otherwise. It was unjust for the appellant to suggest that the respondent ought not to have paid Chemitrade on the invoices and the respondent should therefore be estopped from asserting that nothing was due on the invoices.
>
> (4) There were documents to suggest that the appellant, Chemitrade and the respondent had proceeded upon the assumption that the factoring agreement was a valid assignment. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the document.

[86] The defendant further contends that the plaintiff had released payment to the beneficiary under the Onshore Foreign Currency Loan ("OFCL") which is the medium used by the plaintiff to make payment to the beneficiary pursuant to the negotiation under the LC. According to PW1, at the material time, OFCL was the only trade-related product of the plaintiff which allowed payment to be made to the beneficiary in foreign currency. As the LC is transacted in USD, the plaintiff used OFCL to make payment to the beneficiary after they negotiated the documents presented under the LC.

[87] PW1 denied that the plaintiff granted any loan or financing to the beneficiary. He also confirmed the sum of USD1,983,765.65 was properly paid to the beneficiary pursuant to negotiation of the documents. PW1 gave evidence that the plaintiff did not grant any loan to the beneficiary and the OFCL is a medium used by the plaintiff to make payment to the beneficiary pursuant to negotiation under the LC. The acceptance advices dated 25 November 2011 issued by the plaintiff to the beneficiary showing the payment made under the LC are standard templates. The plaintiff issued the standard acceptance advices for actual OFCL financing or in cases where the plaintiff makes payment in foreign currency pursuant to negotiation of documents in letter of credit transaction without any financing.

[88] This court is satisfied with PW1's evidence. He was not shaken in cross-examination. This court is further compounded by the fact that the contemporaneous documentary evidence (ie, the documents, bills of exchange, documentary collection and/or negotiation forms, the plaintiff's covering schedules enclosing the documents and the acceptance advices), viewed in their entirety supports PW1's evidence. They show that the plaintiff has paid the sum of USD1,983,765.65 to the beneficiary pursuant to the negotiation of the documents under the LC and not pursuant to any loan or financing granted to the beneficiary. DW1 unequivocally agrees that the payment made by the plaintiff to the beneficiary on 25 November 2011 was pursuant to the negotiation of the documents presented by the beneficiary to the plaintiff.

[89] The defendant is not entitled to dispute their liability on the ground stated in the above to avoid reimbursement to the plaintiff because as stated earlier and at the risk of repetition, at the material time, the only reason that the defendant gave for not honouring their reimbursement undertaking was due to the purported discrepancies. Quoting the wise words of the Singapore High Court in *Amixco Asia (Pte) Ltd v. Bank Bumiputera Malaysia Bhd (supra)*, "the party must stand or fall on the grounds given within the time. It would be illogical if some grounds may be given at a later date." Pursuant to art. 7(b) and (c) UCP-600, the defendant as the issuing bank must honour their reimbursement undertaking and make the payment to the plaintiff as the negotiating bank as the plaintiff had negotiated a complying presentation and forwarded the documents to the defendant.

[90] The defendant further argues that the plaintiff had fraudulently released payment to the beneficiary before the maturity date of the LC and before the defendant and the applicant had the opportunity to examine the documents. It is understood that the purpose of negotiation in a LC transaction is to enable the beneficiary to obtain payment before maturity date by selling the documents to the negotiating bank. In turn, the negotiating bank is entitled to present the documents in their own right to the issuing bank for payment and to sue if the undertaking to reimburse is not honoured (*China New Era International Ltd v. Bank of China (HK) Ltd & Ors*, CA (HK) *(supra)* and *Jack:Documentary Credits*, 4th edn *(supra)*). DW1 himself admits and acknowledges that fact. After all the fact that the plaintiff has released payment to the beneficiary before the maturity date does not absolve the defendant from their obligation to honour the reimbursement undertaking they gave upon receipt of the documents presented by the plaintiff. In the circumstances, the defendant's contention of fraudulent act on the part of the plaintiff in releasing the payment to the beneficiary before the maturity date of the LC is wholly unsustainable.

[91] The plaintiff is only required to plead material facts relating to their claim and the fact that the plaintiff did not specifically plead that the original documents were returned to them and declare the status of the goods does

not defeat their claim. In the final analysis, an LC transaction is a separate transaction from the underlying sale contract. The plaintiff as the negotiating bank only deals with documents and not with goods. As such, the defendant's contention that the plaintiff has failed to plead in their statement of claim that the original documents were returned to them and declare the status of goods is wholly misplaced.

[92] After acting pursuant to the request by the defendant and after negotiating the documents, the plaintiff has a valid cause of action against the defendant to enforce the reimbursement undertaking and to seek payment and reimbursement of the sum paid to the beneficiary from the defendant. The totality of evidence adduced before this court clearly show that the defendant is obliged to honour the reimbursement undertaking and make the necessary payment under the LC. As the defendant has failed to give a valid notice of refusal to the plaintiff pursuant to art. 16 UCP-600, the defendant is precluded from claiming that the documents contained purported discrepancies.

Conclusion

[93] For the reasons stated above, this court finds the plaintiff succeeds in proving their case against the defendants on a balance of probabilities and the defendant has failed to make out their defence. The plaintiff's claim was therefore allowed.

Post-Script

[94] After this court delivered its decision on 13 August 2018, the plaintiff's solicitor *via* letter dated 4 September 2018 had requested for an appointment with the court to resolve the terms of the draft judgment dated 13 August 2018 as the parties were unable to agree on the judgment sum in Ringgit Malaysia ("RM') and the currency exchange rate to be applied to the judgment sum.

[95] It is the plaintiff's contention that the equivalent of the sum USD1,983,765.65 which was allowed by the court on 13 August 2018 should be RM8,118,560.92 based on the prevailing exchange rate of USD1 = RM4.0925.

[96] The defendant on the other hand takes the position that the currency exchange rate should be at USD1 = RM3.06 as stated in the amended writ and the amended statement of claim. The defendant's solicitor relied on the decision in *AMMB International (L) Ltd v. Pernas Holdings Sdn Bhd & Anor* [2004] 1 LNS 525; [2005] 2 MLJ 509 where Abdul Malik Ishak J took the view since the defendants therein failed to plead the currency issue in their statement of defence, the principle of estoppel should be invoked against them vigorously.

[97] Since the defendant undertook to pay and reimburse the plaintiff in USD, the plaintiff is entitled to the judgment sum in USD. The issue to be determined is the judgment sum equivalent in RM.

[98] It is of the considered view that this court is not *functus officio* to determine the correct currency exchange rate to be applied in relation to the judgment sum granted in USD. This court is guided by the Federal Court decision in *Seong Fatt Sawmills Sdn Bhd v. Dunlop (M) Industries Sdn Bhd* [1984] 1 CLJ 350; [1984] 1 CLJ (Rep) 326; [1984] 1 MLJ 286 which held as follows:

> (3) the learned judge was correct in giving a supplementary judgment, after re-opening the case to hear arguments on damages, to award damages for loss of profits. *Where it is necessary and the justice of the case requires it, the court should be at liberty to re-open the case, particularly where there has been only a provisional order and this is done to perfect the order*. (emphasis added).

[99] It is undisputed that at the time when the plaintiff's solicitor requested for the appointment, the judgment of this court has not been sealed or perfected. In *Chua Weng Meng v. Wong Kok Kong* [1999] 6 CLJ 7; [1999] 2 MLJ 416 the respondent ('the plaintiff') brought an action at the Sessions Court against the appellant ('the defendant') for negligence arising from a motor accident. A total judgment sum of RM207,742 and costs of the action were awarded to the respondent on 28 January 1997. Before the order could be perfected, there was a dispute as to the costs. An application was subsequently made by the respondent by way of a letter dated 18 July 1997 to the learned Sessions Judge who tried the case, to settle the dispute pursuant to O. 29 r. 9(4) of the Subordinate Courts Rules 1980 ('the SCR'). The learned Sessions Judge decided on 30 December 1997 that the costs awarded to the respondent should be varied to taxed costs. The appellant appealed against this decision. The issues in this case are whether: (i) the learned Sessions Judge was empowered to vary the earlier order as to costs pronounced when it had not been perfected; (ii) the learned judge had judicially and correctly exercised his discretion in varying the order of costs to taxed costs. Zulkefly J (as he then was) after analysing the earlier authorities including the case of *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd (supra)* outlined succinctly the governing principles as to when and in what circumstances the court may alter, vary or amend a judgment or an order pronounced though not perfected. His Lordship stated as follows:

> Having analysed the above cited cases, a clearer picture is formed on the governing principles as to when and in what circumstances the court may alter, vary or amend a judgment or an order pronounced though not perfected. Such governing principles in my view can be outlined as follows:
>
> (1) The application to recall the judgment or order for the purpose of reviewing it must be done expeditiously.

(2) Having regard to the extensive rights of appeal, the power to recall an order which has not been passed and entered should be sparingly exercised if such issues for further consideration can be left to be dealt with by way of appeal to the Court of Appeal.

(3) There must be an intervening act or event from the day the order was pronounced to the day when the order was recalled for review and that an unperfected order is recalled when there is some doubt regarding the correctness of the order as orally pronounced.

(4) Where it is necessary and the justice of the case requires it to be reviewed and when a judge reopened the case with a view to perfecting the order.

Based on the above stated governing principles and taking into consideration the facts and circumstances of the present case, it is my finding that the learned sessions judge was empowered and justified in varying the order for costs when the order had not been perfected. I am of the view that an order pronounced by a judge whether in open court or in chambers can always be withdrawn, altered or modified by him either on his own initiative or on the application of a party, until such time as the order has been drawn up, passed and entered. When a judge has pronounced judgment and make any order, he retains control over the case until the order giving effect to his judgment is formally completed. However, such control must be used in accordance with his discretion, exercised judicially and not capriciously.

[100] The sum claim herein is RM6,070,322.89 premised on the exchange rate of USD1 = RM3.06 as stated in the amended writ which was the exchange rate at the time the plaintiff filed their claim on 28 January 2014. The plaintiff had in fact prayed for "such other and further orders that the court deems fit and proper". Based on the decision of *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishnan Kaliannan* [2013] 7 CLJ 413; [2013] 6 MLJ 149, where the Federal Court held that the *omnibus* prayer 'Any other or further relief or order which this Honourable Court deems fit' should not be treated as a mere ornament to pleadings devoid of any meaning' and premised on the principle that the court would secure for the creditor what they have judgment sum in RM based on the prevailing exchange rate at USD1 = RM4.0925 which is the exchange rate at the time the judgment was given.

[101] Even in the case of *AMMB International (L) v. Pernas Holdings Sdn Bhd & Anor* [2004] 1 LNS 525; [2005] 2 MLJ 509 cited by the defendant, the High Court had stated that:

The plaintiff was entitled to fashion its claim in the American Dollars and this court would convert that claim in Ringgit Malaysia at the appropriate time. And the appropriate time would be at the date of the judgment. Indeed this was the approach adopted by the House of Lords in the case of *Miliangos v. George Frank (Textiles) Ltd* [1976] AC 443. In short, it is now possible and permissible to give judgment in a foreign currency and enforce it by applying the rate of exchange at the date of payment or at the date of

execution. This simple and logical principle of law has been accepted here as well as across the causeway (*Wong Li Fatt William (an infant) v. Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497; *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 7 MLJ 270; *Ooi Han Sun & Anor v. Bee Hua Meng* [1991] 3 MLJ 219; and *Wardley Ltd v. Tunku Adnan & Anor* [1991] 3 MLJ 366). (emphasis added)

[102] Unlike the case of *AMMB International (L) Ltd* above where the principle of estoppel was invoked against the defendants therein as they failed to plead the currency issue in their statement of defence, in the present matter, the conversion to RM currency has been pleaded by the plaintiff. In *Inter Diam Pte Ltd v. PJ Diamond Centre Sdn Bhd* [2002] 4 CLJ 715 where the equivalent amount in RM was not stated in the alternative claim in the statement of claim, Hishamudin Mohd Yusof J (as he then was) stated that such alternative claim in that manner (ie, without actually specifying the amount in RM) is legally proper and the date of conversion can either be the date of judgment or the date of payment.

[103] In the upshot, the defendant can never be said to be prejudiced by the prevailing exchange rate at USD1 = RM4.0925 because the defendant has been ordered to pay USD1,983,765.65 to satisfy their liability under the judgment at the present time. If the defendant decides to pay the sum of USD1,983,765.65 as per the order of the court, they will have to pay approximately RM8,118,560.92 to obtain USD1,983,765.65.

[104] On the contrary, if the exchange rate is fixed at USD1 = RM3.06 and the judgment sum at RM6,070,322.89, the plaintiff, based on the prevailing exchange rate, will only obtain payment of USD1,483,279.88 which is USD500,488.77 less than the sum of USD1,983,765.65 stated in the LC. That will go against the bargain between the parties.

[105] Premised on the above, the orders of the court are as follows:

It is adjudged that the defendant shall pay the plaintiff:

(i) The sum of United States Dollar ("USD") 1,983,765.65 (equivalent to RM8,118,560.92 based on the exchange rate of USD1 equivalent to RM4.0925);

(ii) Interest at the rate of 5% per annum on USD1,983,765.65 (equivalent to RM8,118,560.92 based on the exchange rate of USD1 equivalent to RM4.0925) from 22 January 2012 until the date of payment; and

(iii) Costs of RM60,000.